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No. 92-1168

In The

Supreme Court of the United States

October Term, 1992

TERESA HARRIS,

Petitioner,

v.

FORKLIFT SYSTEMS, INC.,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT

PAUL F. MICKEY, JR.
MICHAEL A. CARVIN
W. ERIC PILSK
ANNE PROFFITT DUPRE
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

STANLEY M. CHERNAU*
CHERNAU, MILAM & WEISS
3rd National Financial
Center
424 Church Street,
13th Floor
Nashville, Tennessee 37129
(615) 244-5480

June 1, 1993

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The magistrate in this case based his decision to dismiss petitioner's hostile environment and constructive discharge claims only in part on the findings of fact set forth by petitioner in her Statement of the Case. In addition, he based his decision on a number of facts, drawn mostly from petitioner's own testimony and proof, that persuaded him that even if Hardy's conduct was offensive, it was not "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an

abusive working environment.' " *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original). Specifically, drawing on the facts set forth below, the magistrate found that Mr. Hardy's conduct would not have interfered with the work performance of a reasonable woman manager. Petition for Writ of Certiorari ("Cert. Pet.") at A-34. This finding forms an independent basis for the magistrate's decision. Accordingly, there is no legal issue in this case that the Court needs to resolve.

During the years she worked at Forklift Systems, Inc. ("Forklift" or "the Company"), petitioner fit into the atmosphere at the Company and enjoyed a good working relationship with Mr. Hardy and other employees. *Id.* at A-17-18, 34-35. She was the only woman who participated in regular, voluntary after-work gatherings in the office, and at these gatherings she drank beer, joked and used coarse language in the presence of Mr. Hardy and other co-workers. *Id.* at A-18, 34; (Joint Appendix ("J.A.") at 72.) Petitioner and her husband also enjoyed a social relationship with Mr. Hardy and his wife during this time period, Cert. Pet. at A-17, 34, and petitioner's husband and Mr. Hardy were in business together, *id.* at A-20.

Petitioner worked at Forklift for over two years before complaining about Mr. Hardy's conduct. *Id.* at A-17, 25-26, 35. She first complained in a meeting with Mr. Hardy on August 18, 1987, which she taped without Mr. Hardy's knowledge. *Id.* In that conversation, Mr. Hardy made it clear he did not know that petitioner was offended by his conduct or that she viewed his conduct as anything other than joking. *Id.* at A-25-26. None of the other female employees at Forklift found Mr. Hardy's

behavior to be offensive or felt that there was a hostile work environment at Forklift. *Id.* at A-25.

Petitioner asserted other reasons for her dissatisfaction with the way she was treated by Forklift. She alleged that she was discriminated against with respect to her salary, the quality of her annual review, her car allowance and her bonus. *Id.* at A-40. In her secretly taped conversation with Mr. Hardy on August 18, 1987, she cited these complaints as a significant reason for her dissatisfaction with Forklift. (J.A. at 78-79, 92-94.) The magistrate found these complaints to be without merit. Cert. Pet. at A-40-45.

The magistrate found another reason for petitioner to be dissatisfied with Forklift. At approximately the same time she decided to leave Forklift, the business relationship between Mr. Hardy and petitioner's husband fell apart. The magistrate observed:

> I am certain that Hardy's business relationship with plaintiff's husband played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. Business relationships rarely deteriorate just like that, especially between social friends and in light of Hardy's financial interest in Cellular Power. It must have been a financial blow to Cellular Power to lose the Forklift account, and I do not doubt that plaintiff had some bitter feelings towards Hardy over this.

Id. at A-22-23.

On August 18, 1987, when petitioner did complain to Mr. Hardy about his conduct, Mr. Hardy responded

favorably, apologized and promised to change his behavior. *Id.* at A-16. According to petitioner's own testimony, in the weeks following that meeting Mr. Hardy did in fact stop making the comments to which petitioner had objected. Approximately one month after he apologized and stopped making those comments, he uttered the "bugger" remark. (J.A. at 58.) Petitioner testified that it was in response to this one statement that she decided to quit her job at Forklift. (*Id.* at 59.)

The magistrate also examined Mr. Hardy's conduct for its severity. He found that, overall, Mr. Hardy's "comments cannot be characterized as much more than annoying and insensitive." Cert. Pet. at A-31. Reviewing his comments more specifically, the magistrate found that most of his comments regarding females' clothes and anatomy "were merely inane and adolescent." *Id.* at A-32. Other comments were "more objectionable," and one comment was "truly gross and offensive." *Id.* at A-33. The magistrate also found "plaintiff tried to get far too much mileage out of" the "Holiday Inn" comment, because "[p]laintiff took the comment as a joke at the time . . . ." *Id.* at A-32-33.

Based on his assessment of the severity of the conduct and the totality of the circumstances surrounding petitioner's employment at Forklift Systems, the magistrate made an ultimate determination that "plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift." *Id.* at A-26. In making this determination, the magistrate found that petitioner could not prevail under any of the tests used by the courts of appeal to identify a hostile work environment.

First, the magistrate determined that Mr. Hardy's comments were not "so severe as to be expected to seriously affect plaintiff's psychological well-being." *Id.* at A-34. Next, the magistrate found that "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." *Id.* He also found that plaintiff was not "subjectively so offended that she suffered injury, despite her testimony to the contrary." *Id.* Finally, the magistrate found that "[a]lthough Hardy may at times have genuinely offended plaintiff, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to plaintiff." *Id.* at A-35. These findings represent the magistrate's assessment that the allegedly harassing conduct was not sufficiently severe or pervasive to alter the conditions of petitioner's employment and create an abusive working environment – the correct analysis under *Meritor*.

SUMMARY OF ARGUMENT

Petitioner presents this case as a referendum on the "psychological injury" test of *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). That test and the "interference with work performance" test are the two approaches adopted by the courts of appeal to determine whether, in the words of *Meritor*, conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor Sav.*

Bank v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original). At bottom, petitioner and her amici are challenging the rule of *Rabidue* that a hostile environment plaintiff must show *both* psychological injury *and* interference with work performance to prevail.

Respondent concurs that requiring a plaintiff to meet both tests to make out a case of environmental harassment is unwarranted. But a careful reading of the magistrate's opinion reveals that this case does *not* turn on application of the serious psychological injury test of *Rabidue*. A determination by this Court that *Rabidue*'s serious psychological injury requirement is not an essential element of a hostile environment case would nonetheless leave intact the finding of the court below that petitioner failed to establish a Title VII violation.

The magistrate applied the *Meritor* standard correctly by carefully examining whether the conduct at issue altered the conditions of petitioner's employment and created an abusive working environment. In determining that petitioner did not meet this standard, the magistrate made four separate findings. First, he determined that petitioner failed to show that the conduct was so severe as to be expected to affect her psychological well-being. Next, he found that the conduct, although offensive, would not have interfered with a reasonable woman manager's work performance. Thus, the magistrate found that petitioner could satisfy *neither* of the two tests used separately or together by the courts of appeal. The magistrate went on to determine that petitioner suffered no injury of any kind as a result of the conduct. Finally, he found that the conduct at issue did not create a work

environment so poisonous as to be intimidating or abusive to petitioner.

Petitioner proposes an alternative standard – mere offensiveness – that would subvert *Meritor* by rejecting any inquiry into how conduct affects employment conditions. This position does not comport with the language and purpose of Title VII and has not been endorsed by any of the courts of appeal or by the EEOC.

Because the magistrate in this case properly applied *Meritor*, he committed no legal error, and thus the decision below should be affirmed.

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ARGUMENT

I. The Magistrate and Court Below Correctly Ruled That a Title VII Hostile Environment Plaintiff Must Show That the Challenged Conduct Altered the Terms, Conditions or Privileges of Her Employment

A. *Meritor Savings Bank v. Vinson* Sets Forth the Proper Standard To Ascertain Whether Sexual Harassment Is Actionable: Whether the Harassment Was Sufficiently Severe or Pervasive To Alter the Conditions of the Victim's Employment and Create an Abusive Working Environment

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988), was enacted to prohibit discrimination in employment. Congress made it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . . " 42 U.S.C. § 2000e-2(a)(1) (1988). Seven years ago, this Court recognized that unwelcome sexual harassment that creates a hostile or abusive workplace atmosphere may give rise to a claim of sex discrimination under Title VII. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).[1]

[1] Courts have recognized different forms of sexual harassment: in *"quid pro quo"* cases, an employer conditions employment benefits on sexual favors; in "hostile environment" cases, sexual discrimination creates a hostile or abusive work environment. This case, like *Meritor*, is based on a hostile environment claim.

The *Meritor* Court set a clear standard to be used in Title VII sexual harassment hostile environment cases: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Id.* at 67 (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). No party in this case has suggested that the *Meritor* standard is incorrect.

Meritor makes clear that Title VII is violated only when there is a demonstrable effect on the conditions of an individual's employment. The purpose of Title VII is to ensure equal *employment* opportunity; the statute regulates employment practices only when those practices are sufficiently severe or pervasive to discriminate against an employee regarding the terms, conditions or privileges of employment. *Meritor*, 477 U.S. at 67; EEOC Br. at 9 ("[E]qual employment opportunity concerns . . . are central to Title VII."). As the EEOC explained in its amicus brief in support of petitioner, "Hostile environment sexual harassment is actionable under Title VII precisely because, and only to the extent that, it substantially affects those terms, conditions, or privileges." EEOC Br. at 17-18.[2] Therefore, offensive conduct is sufficiently

[2] Petitioner cites with approval the EEOC's *Policy Guidance on Sexual Harassment* stating, "The EEOC reasoned it should be sufficient for a Title VII sexual harassment hostile environment plaintiff to show that the harassment was unwelcome and would substantially affect the work environment of a reasonable person." Pet'r Br. at 22 (citing EEOC, *Policy Guidance on Sexual Harassment*, Lab. Rel. Rep. (BNA) 405:6681, 405:6690 n.20 (Mar. 19, 1990) [hereinafter *"EEOC Policy Guidance"*]).

severe or pervasive to establish a violation of Title VII only if it would alter the employment conditions of a reasonable person in the position of the plaintiff and create an abusive environment. *See Meritor*, 477 U.S. at 67. Of course, the plaintiff must also show that the conduct did in fact alter the conditions of her employment.[3] Only

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[3] Title VII prohibits discrimination "against any *individual* . . . ," 42 U.S.C. § 2000e-2(a)(1) (emphasis added), and it is essential that the plaintiff herself demonstrate some injury occasioned by discrimination alleged. *See Connecticut v. Teal*, 457 U.S. 440, 453-54 (1982) ("The principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole."). As the Third Circuit explained, "The subjective factor is crucial, because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990). All other circuit courts agree with this proposition. *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 566 (8th Cir. 1992) ("whether [plaintiff] was at least as affected [by the allegedly harassing conduct] as the reasonable person under like circumstances"); *Ellison v. Brady*, 924 F.2d 872, 875-76 (9th Cir. 1991) ("that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment"); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989) ("Only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII."); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989) ("To succeed on a hostile environment claim, the plaintiff must first demonstrate that the harassment interfered with her ability to perform her work or significantly affected her psychological well-being."), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990). A requirement of personal impact is consistent with this Court's requirement that a plaintiff "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," in order to gain standing. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). *See also, Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) ("whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers . . . . ") (emphasis supplied by the Court) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Even where the Court has granted standing to third parties based on injuries suffered by others, a plaintiff must demonstrate "[t]hat [she] has suffered a concrete redressable injury . . . . " *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2087 (1991) (granting standing to litigant to raise a juror's equal protection claim of racial bias in jury selection process).

[4] To avoid the cumbersome use of both masculine and feminine pronouns, this brief will refer to Title VII plaintiffs who allege sexual harassment as female. Of course, men may also claim to be victims of sexual harassment.

when plaintiff can show such an adverse effect on her employment conditions does the conduct reach the level where it denies what Title VII guarantees -- equal employment opportunity.[4] *See* EEOC Br. at 17-18.

B. The Magistrate in This Case Correctly Applied *Meritor*'s "Altered Conditions" Standard by Finding That the Conduct Did Not Interfere with Petitioner's Ability To Perform Her Job

Lower courts have employed two basic tests to determine whether conduct meets *Meritor*'s altered conditions standard: "interference with work performance" and "psychological injury." Some courts apply only one of these two tests. The Ninth Circuit requires only that the plaintiff show that the conduct "unreasonably interfere[d] with work performance . . . . " *Ellison v. Brady*, 924

F.2d 872, 878 n.8 (9th Cir. 1991). The Eleventh and Third Circuits focus not on work performance, but instead on the plaintiff's psychological state, requiring that the plaintiff show, respectively, an adverse effect on her " 'psychological well being' " and her " 'psychological stability.' " *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1561 (11th Cir. 1987) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (quoting *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989)).

Other courts find a violation if either test is satisfied. The Fourth Circuit combines the two requirements, mandating that the plaintiff show *either* that the conduct interfered with her ability to perform work *or* adversely affected her psychological well-being. *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990).

Two courts require both tests to be met. The Sixth and Seventh Circuits require the plaintiff to show that the harassment both interfered with her work performance *and* had a serious effect on her psychological well-being. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418-19 (7th Cir. 1989); *Rabidue*, 805 F.2d at 619.

Most of petitioner's amici, including the EEOC, agree that interference with work performance is the principal test for determining whether a hostile environment exists.[5] The EEOC states that "[t]he standard that we urge

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[5] Like the EEOC and other amici, respondent interprets the phrase "interference with work performance" broadly to include conduct creating an environment that "hampers [an employee's] opportunity to succeed vis-a-vis her male peers or denies her credit for her achievements." EEOC Br. at 25.

[is] whether the objectionable conduct would affect a reasonable victim's performance of the job . . . . " EEOC Br. at 9.[6] *See* ACLU Br. at 6 (Reasonable person in plaintiff's position must be "significantly hindered in her job performance *or* significantly and adversely affected in her mental, emotional or physical well-being . . . . "); Feminists for Free Expression Br. at 9 ("substantially hindered the plaintiff's job performance"); National Conference of Women's Bar Associations Br. at 10 (interference with victim's ability to do her job).

Petitioner and her amici similarly do not dispute that an alternative way for a plaintiff to establish that a hostile work environment exists is to demonstrate that she has suffered psychological injury.[7] The EEOC and other amici insist strenuously, however, that once a plaintiff has demonstrated interference with her ability to perform her job,

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[6] "Objectionable conduct is sufficiently severe or pervasive if it would interfere with a reasonable person's ability to perform the job." EEOC Br. at 9-10; *see also id.* at 12 ("objectionable conduct that would interfere with the job performance of a reasonable person who is subjected to that conduct"); *id.* at 8 (Harassment must "interfere with the job performance of a reasonable person who is subjected to that conduct.").

[7] *See* EEOC Br. at 22 n. 13 ("[A] plaintiff could conceivably use [proof of psychological harm or emotional distress] as evidence that the offensive conduct would interfere with the job performance of a reasonable person."); Pet'r Br. at 21 (" '[P]sychological well-being' *can* describe a level of severity or pervasiveness sufficient to establish hostile environment liability . . . . ") (emphasis added).

she need not *also* prove additional serious psychological injury.

Respondent agrees with the EEOC that serious psychological harm may be a *sufficient* basis for establishing a hostile environment claim, but it is not a *necessary* basis. EEOC Br. at 22 n.13. Rejecting the *Rabidue* rule, however, would provide no basis for the relief petitioner seeks from this Court. The fact remains that in this case the magistrate independently applied both the "interference with work performance" and "psychological injury" tests, and found as a matter of fact that petitioner had satisfied neither test. Specifically, the magistrate expressly found that "[a] reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance." Cert. Pet. at A-34. The propriety of this finding is not undercut by his separate finding that petitioner failed to demonstrate any likelihood of psychological injury, under the second prong of the *Rabidue* test. Thus, the magistrate unquestionably applied the correct legal standard to this case.

In short, petitioner's assault on the "serious psychological harm" requirement of *Rabidue* is simply immaterial to the resolution of this case. Significantly, this is *not* a case where the lower court found that the conduct in question interfered with the plaintiff's work performance, but nonetheless found the conduct lawful under Title VII because there was no showing of serious psychological harm. Notwithstanding the efforts of petitioner and amici to suggest otherwise, the question upon which certiorari was granted does not bear on the proper

resolution of this case and affords no basis for reversing the judgment of the lower court.[8]

Moreover, a remand to the district court to affirm yet again that respondent did not unreasonably interfere with petitioner's ability to work would be purposeless. This Court will affirm the judgments of lower courts if alternative legal grounds support the initial judgment. *E.g., Miller v. Brooklyn Life Ins. Co.*, 79 U.S. (12 Wall.) 285 (1870) (affirming lower court's decision because of independent factual grounds for decision); *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 652 n.11 (1990) (no need to address allegedly erroneous finding when independent, non-erroneous finding supports decision). Because the lower court here conducted the correct legal inquiry into whether petitioner's work performance was adversely affected, the decision may be reversed only if it is found to be "clearly erroneous." Fed. R. Civ. P. 52(a). As is explained below, no such finding of clear error can be made here. Rather, since the magistrate's "account of the evidence is plausible in light of the record viewed in its entirety," it must be affirmed. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985) (affirming trial court's finding of no discrimination).

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[8] Because interference with work performance forms an independent unchallenged basis for the lower court's decision, respondent respectfully submits that the Writ of Certiorari was improvidently granted, and that the writ should therefore be dismissed. *See Belcher v. Stengel*, 429 U.S. 118, 119 (1976) (dismissing writ as improvidently granted because "it appears that the question framed in the petition for certiorari is not in fact presented by the record now before us" after noting that independent factual grounds supported the lower court's decision).

1. The Magistrate Did Not Rely Exclusively on *Rabidue*'s Psychological Injury Test

The magistrate found that "plaintiff was not able to prove that Hardy's conduct was so severe as to create a hostile work environment for plaintiff at Forklift." Cert. Pet. at A-26. To arrive at this conclusion, the magistrate carefully evaluated the effect of the alleged harassment on petitioner and her work environment and made four *separate* findings:

- Hardy's conduct would not have interfered with a reasonable woman manager's work performance;
- Hardy's conduct was not so severe as to be expected to seriously affect petitioner's psychological well-being;
- Petitioner suffered no injury as a result of Hardy's conduct; and
- Hardy did not create a working environment so poisoned as to be intimidating or abusive to petitioner.

Id. at A-34-35.

First, the magistrate expressly found that Hardy's conduct "would not have risen to the level of interfering with [a reasonable woman manager's] work performance." *Id.* at A-34. The magistrate thus applied the standard advocated by the EEOC and several amici. This objective determination forms an independent basis for the magistrate's decision and requires that the lower court's decision in this case be affirmed.

Second, as suggested by *Rabidue*, the magistrate used psychological injury as a separate basis to assess whether the conduct was "sufficiently severe or pervasive" to create a hostile work environment. Based on his view of the demeanor and credibility of the witnesses, the magistrate determined that Mr. Hardy's conduct was not "so severe as *to be expected* to seriously affect plaintiff's psychological well-being." Cert. Pet. at A-34 (emphasis added). Significantly, the magistrate did not consider whether petitioner had experienced "actual psychological harm," the test that petitioner and her amici decry so vigorously. *See* Pet'r Br. at 23. Instead, by using the future subjunctive, the magistrate indicated that he was considering the likely or possible psychological impact of the alleged harassment, and not, as petitioner argues, requiring her to actually suffer serious psychological injury. In fact, neither the court below nor other district courts in the Sixth Circuit apply the psychological harm test in a way that forces plaintiffs to have already suffered psychological injury.[9]

Moreover, the magistrate's decision does not indicate that the psychological injury test received any particular emphasis or weight. In fact, respondent twice moved for dismissal of petitioner's case for failure to present testimony that would support a finding of "severe psychological harm," once at the close of petitioner's case, (J.A.

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[9] *See also Prichard v. Ledford*, 767 F. Supp. 1425, 1428 (E.D. Tenn. 1990) (violation of Title VII found despite apparent lack of testimony regarding psychological injury where evidence showed interference with work and conduct "would have interfered with the psychological well-being of a reasonable employee"), *aff'd*, 927 F.2d 605 (6th Cir. 1991).

at 136-37), and again at the close of respondent's case, (*id.* at 244). By rejecting both of these motions and proceeding to address the case on its merits, the magistrate demonstrated that he did not regard psychological injury as a decisive issue in this case.

Third, the magistrate found that petitioner did not suffer *any* injury as a result of the alleged harassment. Cert. Pet. at A-34. Fourth, he found that the alleged harassment did not "create[] a working environment so poisoned as to be intimidating or abusive to plaintiff." *Id.* at A-35. This last finding comports with *Meritor*'s requirement to evaluate the impact of the conduct on the work environment and is a further independent basis for the magistrate's ultimate determination.

In addition to these inquiries into the effect of Hardy's conduct, the magistrate went through a process similar to the one petitioner advocates and evaluated the alleged harassment for its "offensiveness." *See* Pet'r Br. at 19-20. The magistrate took care to categorize some of Hardy's conduct as "merely inane and adolescent," some as evidencing a "bad sense of humor," some as "more objectionable," and in one instance only, as "truly gross and offensive." Cert. Pet. at A-32-33. Only after considering the relative offensiveness of all of the conduct, taken together with the "totality of the circumstances" surrounding petitioner's employment at Forklift Systems, did the magistrate find that petitioner had not been subjected to a hostile work environment. Thus, the magistrate in this case determined from the totality of the circumstances that Mr. Hardy's conduct was not sufficiently severe or pervasive to state a claim under *Meritor*.

In respondent's view petitioner is correct in contending that an absolute requirement of psychological injury is unjustified. The outcome in this case however in no way depends on the magistrate's use of a psychological injury test. Indeed, if every reference to psychological injury were expunged from the magistrate's opinion, no grounds would exist to reverse his decision. His three alternative findings, and in particular his finding that the alleged harassment would not have interfered with a reasonable woman manager's work performance, constitute an independent and proper basis for his decision. Therefore, the lower court should be affirmed.

2. The Magistrate's Decision Rests on Findings of Fact That Are Not Clearly Erroneous

Supporting the magistrate's finding that there was no discrimination in violation of Title VII was a great deal of testimony, much of it from petitioner herself, that convinced the magistrate that no hostile environment existed at Forklift. As this Court noted in *Meritor*, 477 U.S. at 68, determining whether conduct creates a hostile environment is an intensely factual inquiry, and determining whether a hostile environment exists is a finding of fact. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 961 (8th Cir. 1993). Such a factual finding may be reversed by this Court only if it is "clearly erroneous." Fed. R. Civ. P. 52(a); *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) ("[A] finding of intentional discrimination is a finding of fact . . . . "). In *Anderson*, this Court stated: " '[A] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the

entire evidence is left with the definite and firm conviction that a mistake has been committed.' " 470 U.S. at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). The Court went on to note:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74. Accordingly, the magistrate's determinations of fact, particularly as they relate to credibility, deserve the utmost deference.

Although the magistrate considered this a "close case," Cert. Pet. at A-31, he ultimately found that Mr. Hardy's conduct was not "so severe as to create a hostile work environment for plaintiff at Forklift," *id.* at A-26. It is important to bear in mind that the magistrate was charged with evaluating "the totality of the circumstances" in which "[n]o one factor alone determines whether particular conduct violates Title VII." *EEOC Policy Guidance*, Lab. Rel. Rep. (BNA) at 405:6691.[10] That factual inquiry is ultimately a question of degree, and is quite properly left to the discretion of the trial courts.

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[10] The rulings, interpretations and opinions of the EEOC under Title VII constitute " 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In examining the totality of the circumstances, the magistrate carefully considered Mr. Hardy's behavior. He frankly found it offensive. Cert. Pet. at A-33. But he also examined the context in which the conduct occurred. For example, the magistrate found that "[o]ther females employed at Forklift were not offended by Hardy's vulgar sexual comments." *Id.* at A-18. Similarly, he found that "plaintiff tried to get far too much mileage out of" the "Holiday Inn" comment, because "[p]laintiff took the comment as a joke at the time . . . . " *Id.* at A-32-33. He further found that petitioner "loved her job . . . ," that "[s]he and her husband socialized with Hardy and his wife . . . ," that she "often drank beer and socialized with Hardy and her co-workers . . . ," and that she "herself cursed and joked and appeared to her co-workers to fit in quite well with the work environment." *Id.* at A-34-35. Despite ample opportunity, "plaintiff was not inspired to broach the issue [of harassment] with [Hardy] for over two years." *Id.* at A-35. When she did complain, in a conversation secretly taped by petitioner, Mr. Hardy expressed surprise that petitioner had been offended and had taken his comments as anything other than jokes. *Id.* at A-25-26. As a result of her complaint, Mr. Hardy in fact stopped making such comments. According to petitioner's testimony, he made only one additional offensive comment, approximately one month later. (J.A. at 58.)

Furthermore, the magistrate found that the deterioration of the business relationship between petitioner's husband and Hardy "played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. . . . I do not doubt that plaintiff had some bitter feelings

towards Hardy over this." Cert. Pet. at A-22-23. In addition, the magistrate did not assign any credibility to petitioner's testimony that she incurred any injury as a result of Hardy's conduct. *Id.* at A-34. Although petitioner argues that her testimony as to injury was "unrebutted," Pet'r Br. at 6, 43, she ignores the fact that it was *unbelieved*. Cert. Pet. at A-34. Similarly, the magistrate rejected her assertions that she had been discriminated against with respect to her salary, bonus, car allowance and review. *Id.* at A-40-45. In sum, having listened to petitioner's testimony, having observed her demeanor and having heard the uncontradicted testimony regarding disparate treatment, the magistrate did not believe her testimony on these crucial points.

Based on this evidence, the magistrate reasonably determined that petitioner had failed to demonstrate the existence of a hostile work environment at Forklift. The magistrate's view of the evidence is "plausible in light of the record viewed in its entirety" and therefore "cannot be clearly erroneous." *Anderson*, 470 U.S. at 473-74. Recognizing the deference these factual determinations are due, almost all of the petitioner's amici, including the EEOC, suggest only that the case be remanded; petitioner is all but alone in requesting reversal. But petitioner and her amici miss the point that even remand is unwarranted. The magistrate applied the correct legal standard and made factual findings that cannot be said to be clearly erroneous. Therefore, the decision of the lower court should be affirmed.[11]

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[11] Petitioner advances a separate argument challenging the magistrate's adverse determination on her constructive discharge claim, in effect asserting that a finding of sexual harassment would *compel* a finding of constructive discharge. The Court expressly limited review to the narrow question of whether psychological injury is a necessary element of a hostile environment claim under Title VII, and thus the issue of constructive discharge is not properly before this Court.

In addition, petitioner is simply wrong on this point. The EEOC and the majority of the courts require a plaintiff to show more than a violation of Title VII to establish constructive discharge. "[A]n employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when these conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation." *EEOC Policy Guidance*, Lab. Rel. Rep. 405:6693 (and cases cited therein). Therefore, assuming *arguendo* that the magistrate erred in his findings on hostile environment, it does not follow automatically that petitioner was constructively discharged. Neither the EEOC nor any court has adopted petitioner's argument that the presence and effectiveness of internal grievance procedures are decisive on this issue.

II. Petitioner's Alternative Standards Wholly Ignore *Meritor*'s "Altered Conditions" Requirement

Hostile environment cases present courts with a difficult question, unique in Title VII jurisprudence: how does conduct unrelated to a specific job benefit nonetheless affect a term, condition or privilege of employment? *Meritor* answered this question by holding that such conduct violates Title VII when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor*, 477 U.S. at 67 (alteration in original). The rationale for this rule is straightforward: if an employee must endure a " 'gauntlet of sexual abuse' " to be a member of the workforce, she has suffered a work-related deprivation

by virtue of sex, and the terms and conditions of her employment have been altered. *Id.* (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

A. Offensiveness Alone Does Not Necessarily Demonstrate the Existence of Discriminatory Employment Practices

Ignoring the reasoning of this Court in *Meritor*, petitioner argues that proving conduct to be "severe or pervasive" should suffice to establish a sexually abusive environment in violation of Title VII.[12] Her proposed standard considers only the "severity or pervasiveness" of the alleged harassment, without any inquiry into the *effect* of that conduct on the work environment. Pet'r Br. at 19-20. For petitioner, offensive conduct in the workplace is analogous to the concept of *res ipsa loquitur* in torts: the mere fact that offensive statements were made is enough to imply a violation of Title VII.

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[12] Petitioner endorsed a different and equally flawed standard in her petition for writ of certiorari. There she argued that once she had demonstrated that she was offended and that a reasonable woman manager would be offended by the employer's conduct, she had established a violation of Title VII. Cert. Pet. at A-29-30. To support this argument, petitioner incorrectly cited *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991) for the proposition that offensive conduct alone is sufficient to establish a violation of Title VII. Cert. Pet. at A-29. An examination of that case reveals, however, that the Ninth Circuit never adopted such a standard. In fact, the court indicated that unreasonable interference with work performance was the determinative factor in hostile environment cases. *Ellison*, 924 F.2d at 878 n.8 (citing *Meritor*, 477 U.S. at 65).

The plain language and purpose of the statute and the decisions of this Court mandate a standard that takes into account the actual effect of alleged harassment in the workplace. The statute requires that the Title VII plaintiff ground her claim in discrimination *"with respect to* [her] compensation, terms, conditions, or privileges of employment . . . . " 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added). Unless discrimination affects a term, condition, or privilege of employment, it cannot violate Title VII. In arguing that Title VII prohibits "discrimination" without regard to "the result of the discrimination . . . ," Pet'r Br. at 17, petitioner ignores the plain language of the statute.

Petitioner's standard is also inconsistent with the general purpose of Title VII. As the EEOC recognizes, "the statutory focus of Title VII [is] on the *effects*, rather than the motivation, of discriminatory practices." EEOC Br. at 13, n.8 (emphasis added). As this Court has repeatedly stated, " 'Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.' " *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 422-23 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)) (emphasis supplied by the Court).[13] Petitioner's insistence on evaluating harassment by focusing on the alleged harasser's actions in the abstract, without regard to the effect on the employee, is thus inconsistent with the clear purpose of the Act.

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[13] The legislative history of Title VII underscores that "[n]o bill can or should lay claim to eliminating all of the causes and consequences of racial and other types of discrimination against minorities." H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* 1964 U.S.C.C.A.N. 2391, 2393.

Petitioner's proposed rule similarly ignores the express language of *Meritor*. Although petitioner borrows the words "severe or pervasive" from *Meritor*, Pet'r Br. at 19, she disregards *Meritor*'s instruction that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Meritor*, 477 U.S. at 67. " '[M]ere utterance of an ethnic [or sexual] epithet which engenders offensive feelings in an employee would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). *See also* EEOC Br. at 18 (Isolated utterance of epithet may offend employee but not violate Title VII.). To violate Title VII, offensive conduct must be *sufficiently* severe or pervasive to "*alter* the conditions of [the victim's] employment *and create* an abusive working environment." *Meritor*, 477 U.S. at 67 (emphasis added) (alteration in original). The Court's use of the word "mere" before "utterance" and its use of the words "degree," "sufficiently," "alter," "significant" and "create" show clearly that the Court presumed that *something* beyond mere offense must be required. "The issue under Title VII is whether the employer has maintained a discriminatory working environment, not whether the employer has inflicted emotional distress." EEOC Br. at 9, 18.

The principal problem with petitioner's standard is that it rests on the *assumption* that offensive conduct automatically alters the conditions of employment and creates an abusive working environment. By refusing to

evaluate the impact of alleged harassment, petitioner severs hostile environment claims from Title VII and eliminates the critical need to establish that certain conduct has in fact interfered with a particular plaintiff's employment opportunity. *Cf.* EEOC Br. at 19 (Focus should be on equal employment opportunity.) Although the fact that conduct is offensive may create an inference of a hostile work environment, and thus be sufficient to survive a summary judgment motion, it does not, as petitioner argues, mandate a ruling for plaintiff. A plaintiff can prevail only if the conduct "altered the conditions of employment and created an abusive working environment," *Meritor*, 477 U.S. at 67, and it is in the trial court's discretion, absent clear error, to determine whether the particular conduct proved at trial had that specific result.

B. In Hostile Environment Cases It Is Especially Important To Demonstrate That Conduct Interferes with Work Performance

Requiring a plaintiff to show a nexus between conduct and ability to perform the job is particularly appropriate in cases such as this one, where the alleged harassment consists entirely of speech, and the adverse effect of the conduct at issue is far less obvious and direct than in other cases of discrimination or sexual harassment. Other Title VII plaintiffs can point to a specific job benefit they have been denied: a raise, a promotion, or the job itself, to name obvious examples. In these cases, both discrimination and deprivation of an employment opportunity are plainly present. Similarly, in a *quid pro quo* case the linkage between discriminatory conduct and employment opportunity is express. Moreover, when a

hostile environment is created through propositions for sexual favors or unwelcome physical contact, it may be relatively easy to see how the terms and conditions of a plaintiff's employment have been altered.

As the conduct becomes less physical, less directed at the plaintiff and less suggestive of requests for sexual favors, it becomes less obvious that the conduct has altered the terms and conditions of employment. It is for this reason that hostile environment plaintiffs bear the burden of demonstrating some nexus between offensive conduct and their ability to perform their jobs.[14] Respondent does not contend that pure speech cannot rise to the level of a Title VII violation—only that it less obviously does so. Calling female employees "girls" or opening office meetings with a tasteless joke may constitute violations of Title VII, but it does not necessarily follow that they do. The question in such cases is necessarily one of degree, involving fine judgments on context, individual personalities and credibility. Clearly these issues must be entrusted to the sound discretion of the fact finder that receives the relevant evidence.

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[14] Petitioner argues, in essence, that because requiring a Title VII plaintiff to show serious psychological injury as a threshold would establish an impossible burden, *no* showing of altered conditions should be required. This proposition does not follow as a matter of logic, and *Meritor*, every court of appeal and the EEOC recognize that some showing of alteration of employment conditions is necessary to prove a violation of Title VII. *See*; pp. 9-13 above.

C. Alleged Harassment Must Be Considered from the Perspective of a Reasonable Person in the Position of the Plaintiff

Petitioner also argues that a court can determine whether conduct creates a hostile work environment "without resorting to any reasonable person standard." She suggests that "[t]he trier of fact would determine whether the plaintiff's allegations that the conduct was sexually offensive are credible and, in conjunction with other proof [not specified], establish that the severity or pervasiveness test is met." Pet'r Br. at 41.

Petitioner's attempt to assess harassment subjectively, rather than from the perspective of a reasonable person, is in direct conflict with all lower federal courts and the EEOC. All circuits agree that an employer's conduct must be viewed from the perspective of a reasonable person in the position of the plaintiff. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989); *Paroline v. Unisys Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *aff'd in part, rev'd in part*, 900 F.2d 27 (4th Cir. 1990).[15] *See also* EEOC Br. at 12-13; *EEOC Policy Guidance*, Lab. Rel. Rep. 405:6681 ("In determining whether harassment is sufficiently

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[15] The courts use several different formulations, including "reasonable person," *Brooms*, 881 F.2d at 419, "reasonable victim," *see, e.g., Paroline*, 879 F.2d at 105, and "reasonable woman," *Ellison*, 924 F.2d at 879; *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987). Petitioner attempts to make much of this distinction. Pet. Br. at 27-41. For the purposes of this case, the Court need not address the issue. The magistrate in this case based his determination on the perspective of "[a] reasonable woman manager under like circumstances." Cert. Pet. at A-34.

severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a 'reasonable person.' Title VII does not serve as a vehicle for vindicating the petty slights suffered by the hypersensitive."). Conduct that would have no effect on a reasonable person in similar circumstances simply is not "sufficiently severe or pervasive 'to alter the conditions of . . . employment . . . . ' " *Meritor*, 677 U.S. at 67. Moreover, grounding this threshold requirement in reasonableness gives employers and co-workers some notice of conduct that may violate Title VII and ensures that sexual harassment violations will be based on gender, not on mere sensitivity. Indeed, petitioner herself acknowledges in other parts of her brief that a standard of reasonableness is necessary to "protect[] employers from the claims of hypersensitive claimants." Pet'r Br. at 39-40.

Contrary to petitioner's assertion, a reasonable person standard does not ignore the defendant's conduct, or take the perspective of a "harasser," or transport with it all the demeaning stereotypes of women that persist in society at large. The standard is that of a reasonable person, not an unreasonable sexist. And the inquiry is whether the defendant's conduct – objectively viewed – creates an abusive and intimidating work environment. If the answer is negative, no violation of Title VII has occurred.

D. Examination of the Effect of the Alleged Harassment Is Necessary To Ensure That Title VII Regulates Employment Practices and Does Not Become a Content-Based Prohibition of Speech

Petitioner's proposed "offensiveness" standard would not only broaden Title VII beyond its Congressionally mandated limits, but would also create a serious conflict with the First Amendment. As petitioner would apply it, Title VII would punish speech merely because a plaintiff found the speech offensive. This Court's consistent First Amendment rulings forbid that result.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it."); *Street v. New York*, 394 U.S. 576, 592 (1969) (It is "firmly settled" that "the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").[16] This is true

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[16] *See also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) ("[W]hen the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power."); *Cohen v. California*, 403 U.S. 15, 21 (1971) (overturning conviction under breach of peace ordinance for wearing jacket bearing a profane slogan, refusing "to shut off discourse solely to protect others from hearing [objectionable speech] . . . ").

even if the speech is offensive because it demeans certain groups or individuals on the basis of criteria such as gender, race or religion. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992) (dismissing indictment under St. Paul's Bias-Motivated Crime Ordinance for burning a cross in yard of black family because ordinance violated the First Amendment); *id.* at 2559 ("expressive activity [that] causes hurt feelings, offense, or resentment does not render the expression unprotected.") (White, J., concurring).[17]

To pass constitutional muster, Title VII cannot be construed to prohibit all speech that may be sexually offensive; rather, its ban must be limited to speech that is sufficiently offensive to have an impact on a plaintiff's ability to do her job. In effect, Title VII regulates "sexually derogatory 'fighting words,'" *id.* at 2546 (Scalia, J.), which if they are sufficiently severe and pervasive to alter the terms and conditions of employment, "merge into conduct" and "may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 2560 n.13 (White, J. concurring). Congress, however, may not constitutionally prohibit speech as an incidental or secondary effect of Title

[17] *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (protecting under the First Amendment leaflets criticizing "practices [that] were offensive to [petitioners], as the views and practices of petitioners are no doubt offensive to others"); *Terminiello v. City of Chicago*, 337 U.S. 1, 3 (1949) (overturning conviction under breach of peace ordinance for speech that "vigorously, if not viciously, criticized various political and racial groups . . . ").

VII's general prohibition against discriminatory employment practices unless the speech has a close nexus to conduct and an impact on a plaintiff's employment opportunities. *See, e.g., Boos v. Barry*, 485 U.S. 312, 321-22 (1988) (Regulations that focus on "the direct impact that speech has on its listeners" are content-based; the "emotive impact of speech on its audience is not a 'secondary effect.' "); *R.A.V.*, 112 S. Ct. at 2549 (same). Thus, the courts can avoid a direct conflict with the First Amendment only by ensuring that Title VII regulates employment practices and not, as petitioner proposes, merely offensive speech.

CONCLUSION

The magistrate correctly found that petitioner failed to establish her Title VII claim. Because no decision by the Court on the question presented can mandate reversal or remand, the decision of the lower court should be affirmed.

Respectfully submitted,

PAUL F. MICKEY, JR.
MICHAEL A. CARVIN
W. ERIC PILSK
ANNE PROFFITT DUPRE
SHAW, PITTMAN, POTTS & TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

STANLEY M. CHERNAU*
CHERNAU, MILAM & WEISS
3rd National Financial Center
424 Church Street, 13th Floor
Nashville, Tennessee 37129
(615) 244-5480

*Counsel of Record

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